86-401

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE J. AMOS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JURISDICTIONAL STATEMENT

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

MICHAEL CARVIN
Deputy Assistant Attorney General

ANDREW J. PINCUS
Assistant to the Solicitor General

IRVING GORNSTEIN
WILLIAM R. YEOMANS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

27pp

QUESTION PRESENTED

Whether Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, which exempts all activities conducted by religious organizations from the statutory prohibition against discrimination in employment on the basis of religion, is invalid under the Establishment Clause of the First Amendment to the extent that it exempts the secular activities of such organizations from the prohibition against religious discrimination.

PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the jurisdictional statement filed by the private defendants in this case, *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, No. 86-179, at page ii.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulation and rule:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE J. AMOS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order and final judgment of the district court (J.S. App. 83a-87a) is unreported.[1] The prior opinion of the district court granting in part appellees' motion for summary judgment (J.S. App. 88a-122a) is reported at 618 F. Supp. 1013. The prior opinion of the district court denying the private appellants' motion to dismiss (J.S. App. 1a-82a) is reported at 594 F. Supp. 791.

---

[1] "J.S. App." refers to the appendix to the jurisdictional statement filed by the private appellants, *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, No. 86-179.

JURISDICTION

The judgment of the district court was entered on May 16, 1986. The United States filed a notice of appeal to this Court on June 13, 1986 (App., *infra*, 1a-2a). On August 6, 1986, Justice White issued an order extending the time within which to docket this appeal to and including September 11, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

2. Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

STATEMENT

1. The Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB) and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints (COP), conduct a variety of activities on behalf of The Church of

Jesus Christ of Latter-day Saints.[2] One of these activities is the operation of the Deseret Gymnasium, a recreational structure located in Salt Lake City, Utah, that contains facilities for physical exercise and athletic games and is open to the general public. The gymnasium was constructed on property owned by the CPB with funds supplied by the COP. Moreover, the gymnasium has no independent financial existence; purchases and hiring for the gymnasium are conducted under the auspices of the COP. The policy governing employment at the gymnasium—which also applies to employment in other Church-owned activities—is to hire only members of the Church who are eligible for a "temple recommend," a privilege that is accorded to observant Church members. J.S. App. 2a-4a, 11a-15a, 94a.

Appellee Frank Mayson was employed at the Deseret Gymnasium as an engineer responsible for maintaining the building's physical plant. In the fall of 1980, the director of the gymnasium informed Mayson that he would lose his job unless he qualified for a temple recommend within six months. Mayson did not qualify and was discharged on April 10, 1981. J.S. App. 3a-4a, 17a, 119a.

2. Mayson and several other individuals who lost jobs in Church-owned establishments because they did not achieve temple recommend status subsequently commenced this action against the COP and the CPB in the United States District Court for the District of Utah.[3] The plaintiffs claimed that the discharges

---

[2] The CPB and the COP are corporations organized under Utah law (J.S. App. 2a-3a).

[3] The complaint was styled as a class action, but the district court did not certify a class. The other individual plaintiffs

for failure to obtain a temple recommend constituted discrimination in employment on the basis of religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).[4]

The COP and the CPB moved to dismiss the action, relying on Section 702 of Title VII, 42 U.S.C. 2000e-1, which states that Title VII "shall not apply

---

included appellees Christine J. Amos, Judy L. Bawden, Deniece Kanon, April Joyce Riding, Ruth Arriola, and Shelleen Adamson, who were employed as seamstresses at Beehive Clothing Mills, a Church owned and operated establishment that manufactures garments worn by Church members in religious ceremonies. Each of these individuals was discharged after she failed to satisfy the requirements for a temple recommend. J.S. App. 3a-4a. The district court did not resolve these appellees' claims because it found that disputed issues of fact precluded a determination on motion for summary judgment regarding whether Beehive constitutes a religious or a secular activity (*id.* at 18a-19a, 93a-105a).

Appellee Ralph Whitaker was employed by Deseret Industries, a division of the Church's Welfare Services Department, and also was terminated for failing to obtain a temple recommend (J.S. App. 105a-107a). The district court concluded that "Deseret Industries is a religious activity as there is an intimate connection between Industries and the defendants and the Mormon Church and between the primary function of Industries and the religious tenets of the Church" (*id.* at 116a). The court granted summary judgment in favor of the COP and the CPB with respect to appellee Whitaker's claim, holding that religious activities conducted by religious organizations are exempt from Title VII's prohibition against discrimination on the basis of religion (*id.* at 105a).

[4] The statute bars an employer from "discharg[ing] any individual * * * because of such individual's * * * religion" (42 U.S.C. 2000e-2(a)(1)). The plaintiffs also argued that the discharges violated the parallel provision of the Utah antidiscrimination statute. Utah Code Ann. § 34-35-6(1) (Supp. 1986).

* * * to a religious corporation * * * with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation * * * of its activities." The district court denied the motion, holding that Section 702 violates the Establishment Clause insofar as it exempts the secular activities of religious organizations from the provisions of Title VII prohibiting religious discrimination (J.S. App. 1a-82a).

Implicitly concluding that religious activities conducted by religious organizations could permissibly be exempted from Title VII's nondiscrimination mandate, the district court as a threshold matter considered whether the Deseret Gymnasium constituted a religious activity. The court formulated a three-part test for determining whether an activity conducted by a religious organization is "religious" or "secular." It first evaluated "the tie between the religious organization and the [gymnasium] with regard to areas such as financial affairs, day-to-day operations and management" (J.S. App. 10a). Observing that Church officials appoint the members of the governing board of the Deseret Gymnasium and that the gymnasium has no financial existence independent of the COP (*id.* at 11a-12a), the court concluded that "there is an intimate connection between Deseret and the defendants and the Mormon Church" (*id.* at 12a).

The court next considered whether there was "a clear relationship between the primary function which Deseret performs and the religious beliefs and tenets of the Mormon Church or church administration" (J.S. App. 13a). It found that "[a]lthough the Mormon Church has expressed its desire that members of the Mormon Church engage in physical exercise and [has] attempted to provide a facility to accommodate that desire in an atmosphere which ex-

emplifies its beliefs, the function of Deseret is far from closely related to any religious beliefs or tenets of the Mormon Church or church administration" (J.S. App. 16a (footnote omitted)). The court concluded that the Deseret Gymnasium instead serves the same functions as other gymnasiums. Finally, the court observed that "[n]one of [Mayson's] duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration" (*id.* at 17a). It therefore concluded that the operation of the gymnasium did not constitute a religious activity.[5]

Turning to the question whether the application of Section 702 to a religious organization's secular activities violates the Establishment Clause, the district court evaluated the constitutionality of Section 702 by utilizing the three-part test prescribed by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The district court first found that the 1972 amendment to Section 702 extending the exemption to the nonreligious activities of religious organizations was supported by the secular purpose of limiting government interference with religious activities. The court observed that "[t]he legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose. Furthermore, there is no indication that Congress amended section 702 for a religious purpose or to

---

[5] The court also considered whether the exemption from the prohibition against religious discrimination contained in Section 702 applies to the secular activities of religious organizations. Noting that Congress in 1972 expressly broadened the exemption in order to cover all activities of religious organizations, the court concluded that Section 702 encompasses a religious organization's secular activities. J.S. App. 19a-21a.

promote religion or religious beliefs" (J.S. App. 40a (footnote omitted)).

The court concluded, however, that Section 702 failed the second part of the *Lemon* test because the provision has the primary effect of advancing religion. The court acknowledged that " 'the limits of permissible state accommodation of religion are by no means co-extensive with the noninterference mandate of the free exercise clause' " (J.S. App. 42a-43a, quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970)), but it stated that "if a statute goes beyond what is mandated by the free exercise clause in accommodating religion, the statute may no longer maintain the requisite course of constitutional neutrality" (J.S. App. 43a). The court then determined (*id.* at 43a-58a) that the exemption of the secular activities of religious organizations from Title VII's prohibition against religious discrimination is not necessary to avoid excessive government entanglement with religion and is not compelled by the Free Exercise Clause.

The court also found that Section 702 lacks "characteristics that the Supreme Court has looked to in declaring statutes valid as against claims of establishment clause violations" (J.S. App. 66a). It observed that the exemption did not extend to "a broad spectrum of groups" but was limited to religious organizations (*id.* at 61a), the exemption was not supported by historical tradition or by any threat of hostility to religion, and the exemption was not justified by the concerns underlying the Free Exercise Clause (*id.* at 66a-69a). The court found that Section 702 instead amounts to government sponsorship of religion because it allows religious organizations to increase their influence over the secular economy and "grant[s]

religious organizations an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices" (J.S. App. 70a).

Finally, the district court applied the third prong of the *Lemon* test, considering whether Section 702 fosters excessive government entanglement with religion. The court found that the exemption enables a religious organization to exercise "coercive power" over the religious beliefs of its employees, and that this "potential for impermissible fostering of religion" supports a "finding of excessive entanglement" (J.S. App. 73a, 74a). The court observed, however, that "Section 702 does not require the type of comprehensive, discriminatory and continuous state or federal surveillance that was condemned in cases such as *Lemon*. * * * On the contrary, this exemption was designed to minimize involvement and entanglement between church and state and to ensure that the government and courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state" (J.S. App. 74a-75a (footnote omitted)).

The court concluded that it was not necessary to balance the three *Lemon* factors. On the basis of its finding that "the direct and immediate effect of the exemption * * * is to advance religion," the court held that the application of the exemption to the secular activities of religious organizations violates the Establishment Clause (J.S. App. 75a).[6] Implic-

[6] The court indicated that its "determination regarding [Section 702] applies with equal force to the [parallel] state [law] exemption as it relates to the facts of this case" (J.S.

itly holding that the discharge of appellee Mayson was the result of religious discrimination, the court concluded that the discharge violated Title VII. It ordered the reinstatement of appellee Mayson and awarded back pay with interest (J.S. App. 116a-120a). On January 22, 1986, the court entered a final judgment in favor of appellee Mayson under Rule 54(b) of the Federal Rules of Civil Procedure.

The district court subsequently vacated this judgment and issued an order certifying to the Attorney General of the United States that the constitutionality of Section 702 had been drawn into question in the present case (see 28 U.S.C. 2403(a)). The United States intervened and filed a brief defending the constitutionality of Section 702. Following a hearing, the district court reaffirmed its prior order and again entered a final judgment in favor of appellant Mayson. J.S. App. 83a-87a.

THE QUESTION IS SUBSTANTIAL

The district court has overturned Congress's determination that the statutory program for combating religious discrimination in employment should be adjusted to accommodate the special characteristics of religious organizations. Congress exempted religious organizations from Title VII's prohibition against religious discrimination in order to prevent government interference in religious affairs. The district court's conclusion that Congress's exemption may constitutionally be applied only to the religious

---

App. 8a). It declined to address appellees' arguments that the application of Section 702 to secular activities violates the due process and equal protection principles embodied in the Fifth Amendment (*id.* at 76a), and it dismissed appellees' state law claims for wrongful discharge and intentional infliction of emotional distress (*id.* at 77a-82a).

activities of such organizations would require in every case an examination of the religious beliefs of the particular group to determine whether the activity implicated by the claim of discrimination was sufficiently "religious" to allow invocation of the exemption. This governmental evaluation of the connection between the beliefs and activities of religious organizations is precisely what Congress sought to avoid by adopting the broad exemption contained in Section 702.

The district court plainly erred by concluding that the Establishment Clause, which has as one of its purposes the prevention of entanglement between government and religion, prohibits Congress from acting to ensure the separation of government and religion by adopting a statutory exemption for religious groups.[7] Indeed, this Court repeatedly has approved exemptions from generally applicable statutes for religious individuals and institutions similar to the exemption at issue in this case, and these decisions make clear that Congress acted within its authority by enacting the accommodation of religious groups contained in Section 702. The district court's conclusion that Section 702 violates the Establishment Clause is based upon its application of the test prescribed by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). That court's evaluation of Section 702 under the *Lemon* test is, however, deeply flawed; a proper application of the standard confirms that

---

[7] Two other courts, in dictum, have expressed doubts about the constitutionality of Section 702 as applied to the secular activities of religious organizations. *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 54-57 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974); *Feldstein* v. *Christian Science Monitor*, 555 F. Supp. 974, 978-979 (D. Mass. 1983).

Section 702 comports with the requirements of the Establishment Clause. Review by this Court therefore is clearly warranted.

1. It is well settled that the Establishment Clause does not flatly forbid all government action relating to religion: "Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so" (*Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984)). Quoting a distinguished early commentator, the Court has observed that " '[t]he real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.' " *Ibid.*, quoting 3 J. Story, *Commentaries on the Constitution of the United States* 728 (1833). Thus, the evil against which the Clause protects is the " 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772 (1973) (citation omitted); see also *School District* v. *Ball*, No. 83-990 (July 1, 1985), slip op. 7.

Government accommodation of religious institutions or religious individuals is entirely consistent with these principles. Indeed, the Court has observed that "evidence of accommodation of all faiths and all forms of religious expression" pervades our Nation's history, and that "[t]hrough this accommodation * * * governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people.' " *Lynch* v. *Donnelly*, 465 U.S.

at 677-678 (citation omitted); see also *Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985), slip op. 16-18 (O'Connor, J., concurring in the judgment); *Thomas* v. *Review Board*, 450 U.S. 707, 726-727 (1981) (Rehnquist, J., dissenting); *McDaniel* v. *Paty*, 435 U.S. 618, 638-639 (1978) (Brennan, J., concurring). Far from establishing religion, accommodation by government of religious beliefs or institutions produces a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970)).

The most obvious means by which government may foster this "benevolent neutrality" is through the adoption of special exemptions from generally applicable statutes in order to accommodate individual religious beliefs or protect the autonomy of religious organizations. And this Court consistently has recognized that exemptions of this type do not offend the Establishment Clause. For example, in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), the Court upheld a statute permitting the release of a student from public school classes so that the student could attend a religious center for religious instruction. The Court observed that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions," and held that the exemption on religious grounds from the compulsory attendance requirement did not effect an establishment of religion (343 U.S. at 313-314).

Similarly, in *Walz* v. *Tax Commission*, *supra*, the Court rejected an Establishment Clause challenge to a statute creating a state property tax exemption for property owned by a religious organization and used for religious purposes. The Court could not "read

[the] statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." 397 U.S. at 673; see also *United States* v. *Lee*, 455 U.S. 252, 260 & n.11 (1982) (indicating approval of statute exempting religious objectors from the obligation to pay social security taxes); *Gillette* v. *United States*, 401 U.S. 437 (1971) (upholding exemption from the military draft for conscientious objectors); *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961) (indicating that Sabbatarian exception to Sunday closing laws would be constitutionally permissible); *Selective Draft Law Cases*, 245 U.S. 366, 389-390 (1918) (upholding exemption from the draft for religious objectors).[8]

Section 702 adjusts the regulatory scheme established in Title VII to accommodate the special interests of religious institutions in a manner similar to the exemptions previously approved by this Court. Congress recognized that subjecting the secular activities of religious organizations to the prohibition against religious discrimination would necessitate an inquiry into religious beliefs and a detailed examina-

---

[8] In *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the question was whether the National Labor Relations Board could exercise jurisdiction over teachers employed in church-operated schools. The Court construed the National Labor Relations Act to exclude coverage of such teachers on the ground that a contrary result would require the Court "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" (440 U.S. at 507). Thus, the Court expressly recognized an exemption for religious institutions from a generally applicable regulatory requirement. See also *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (church-run schools exempted from mandatory coverage under Federal Unemployment Tax Act).

tion of the characteristics of the activity implicated by each particular claim of religious discrimination. The investigation would culminate in governmental evaluation of the religious group's conclusion that the activity was sufficiently related to its beliefs to require consideration of religion in connection with employment decisions. Not only would this process require government to enter sensitive areas of religious belief (see *Walz* v. *Tax Commission*, 397 U.S. at 691 (Brennan, J., concurring)), but the threat of government review of employment decisions might inhibit a religious group from acting according to its beliefs out of fear that hiring decisions based upon religion might later be grounds for the imposition of liability under Title VII. Thus, Congress's decision to allow religious groups to use religion as an employment criterion free of government interference has the legitimate effect of accommodating religious institutions and furthering the separation of government and religion.[9]

Moreover, the exemption embodied in Section 702 does not amount to government sponsorship or advancement of religion. The exemption does not in any way grant federal financial aid to religious organizations or directly provide such organizations with a

---

[9] The district court observed (J.S. App. 45a-52a) that courts already examine the employment practices of religious institutions in connection with Title VII's prohibition against discrimination on the basis of race, color, national origin and sex. It seems probable, however, that claims of religious discrimination would be more likely to require government review of religious beliefs, especially where the permissibility of such discrimination turns upon distinguishing between religious and secular activities; indeed, the district court acknowledged this fact (*id.* at 51a). Congress was free to enact Section 702 in order to prevent that possibility.

financial advantage over competitors in the secular economy.[10] In addition, religious groups remain subject to Title VII's prohibition against discrimination in employment on the basis of race, color, national origin, and sex; like other employers, religious organizations are required to report the race, color, national origin, and sex of their employees to the Equal Employment Opportunity Commission (29 C.F.R. 1602.7).[11]

Even if a financial benefit did exist, that circumstance would not automatically render Section 702 violative of the Establishment Clause. The property tax exemption approved in *Walz* v. *Tax Commission*, *supra*, conferred a far greater financial benefit than religious organizations could secure as a result of the exemption contained in Section 702. Yet the Court in that case upheld the exemption and did not find that it resembled impermissible financial aid to religion or could lead to domination of the economy by religious groups.

The district court stated (J.S. App. 69a-70a) that the Section 702 exemption amounts to government sponsorship of religion, but it did not supply the reasons for this conclusion. The mere fact that Section 702 contains an exemption limited to religious organizations obviously does not constitute govern-

---

[10] The district court intimated (J.S. App. 69a-70a) that the exemption for secular activities contained in Section 702 would enable religious organizations to expand their business interests, but it did not supply the reasoning upon which this conclusion was based. Such a conclusion would seem to be at odds with the underlying premise of Title VII that discrimination is uneconomic in part because it prevents employers from hiring the best available candidates.

[11] Neither religious nor secular employers are required to report the religion of their employees.

ment sponsorship of religion; otherwise all accommodations of religion would be barred by the Establishment Clause. An exemption from government regulation simply does not amount to the "symbolic union of church and state" that this Court has prohibited under the First Amendment (*School District* v. *Ball*, slip op. 16).

The district court also observed (J.S. App. 70a, 72a-73a) that Section 702 permits a religious organization to use employment opportunities to encourage adherence to its religious beliefs. Prior to the enactment of Title VII, of course, all private employers were free to discriminate on the basis of religion; Congress's failure to prohibit discrimination by religious institutions during that period plainly did not constitute an establishment of religion. Similarly, the fact that Congress has chosen in some circumstances to exempt religious discrimination from Title VII's antidiscrimination requirement does not violate the First Amendment. The legislative determination that religious institutions should be insulated from this regulatory requirement does not in any way resemble the state sponsorship of religion prohibited by the Establishment Clause. Any advantage obtained by religious groups is not a product of government compulsion; the government simply has left these groups free to follow the dictates of their faiths.[12]

---

[12] The statute found to violate the Establishment Clause in *Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985), slip op. 7, was impermissible because it had the primary effect of "advanc[ing] a particular religious practice"—Sabbath observance—and forced private individuals to accommodate this religious practice without regard to the burden imposed upon those private individuals. Section 702, by contrast, does not endorse any specific practice and does not compel any private

Even the district court agreed that religious groups may discriminate on the basis of religion in connection with their religious activities. Since Congress's failure to prohibit that discrimination does not constitute the establishment of religion, it is difficult to see how the extension of the exemption to include these groups' secular activities could violate the Constitution.

2. The district court's determination that Section 702 violates the Establishment Clause appears to rest in large part upon its view that "if a statute goes beyond what is mandated by the free exercise clause in accommodating religion, the statute may no longer maintain the requisite course of constitutional neutrality" (J.S. App. 43a). This Court never has indicated that an accommodation of religion beyond what is required by the Free Exercise Clause is likely to contravene the Establishment Clause. The Court instead has made clear that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage." *Walz* v. *Tax Commission*, 397 U.S. at 673; see also *Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 18 & n.19 (opinion of Burger, C.J.); *Wallace* v. *Jaffree*, slip op. 16 (O'Connor, J., concurring in the judgment); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *Gillette* v. *United States*, 401 U.S. at 453. Since Section 702 does not constitute government sponsorship of religion and therefore does not contravene the principle underlying the Establish-

---

individual to take any action regarding religious observance. The provision thus mandates separation between government and religion rather than government intervention with respect to religious concerns.

ment Clause, it is a permissible exercise of Congress's authority to accommodate religious institutions.

The district court utilized the test prescribed by this Court in *Lemon* v. *Kurtzman*, *supra*, to evaluate appellees' challenge to Section 702 under the Establishment Clause. *Lemon* set forth a three-part standard: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion' " (403 U.S. at 612-613 (citations omitted)). The district court's decision demonstrates the problems that may result when the *Lemon* standard is applied to evaluate a statute designed to accommodate religious beliefs and institutions—an inflexible construction of the "purpose" or the "effect" components of the test may lead to the incorrect conclusion that the accommodation of religion has a religious purpose or effect and therefore is barred by the Establishment Clause. See *Wallace* v. *Jaffree*, slip op. 17 (O'Connor, J., concurring in the judgment). For that reason, here, as in *Lynch* v. *Donnelly*, 465 U.S. at 679, and *Marsh* v. *Chambers*, *supra*, recourse to the *Lemon* standard is not appropriate in assessing the constitutionality of Section 702.

Even if Section 702 is evaluated under the standard announced in *Lemon*, however, it is clear that the provision is permissible under the Constitution. Section 702 plainly satisfies the first prong of the *Lemon* test. The original version of Section 702 contained an exemption only for religious activities conducted by religious organizations; discrimination in employment on the basis of religion was barred with respect to secular activities conducted by such organizations

(42 U.S.C. (1964 ed.) 2000e-1). Congress amended the statute in 1972 to extend the exemption to all activities conducted by religious organizations (42 U.S.C. 2000e-1). The legislative history of the 1972 amendment makes clear that the purpose of the amendment was to limit government intrusion into matters of religious belief and church administration. See 118 Cong. Rec. 946-949 (1972) (remarks of Sen. Allen); *id.* at 4503 (remarks of Sen. Ervin). The district court correctly concluded that "[t]he legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose. Furthermore, there is no indication that Congress amended section 702 for a religious purpose or to promote religion or religious beliefs" (J.S. App. 40a (footnote omitted)).

The second inquiry under *Lemon* is whether the "principle or primary effect" of the statute is to advance or inhibit religion. The district court inexplicably ignored what it had found to be the secular purpose of the statute in evaluating the statute's effect, and concluded that the statute had the effect of advancing religion. But, as we have discussed (see pages 13-17), the principal effect of the statute is to eliminate government interference with religious organizations. Thus, as in *Walz* and *Zorach*, the effect of the statute is to avoid interference with religious institutions, a result that plainly is permissible under the Establishment Clause (*Wallace* v. *Jaffree*, slip op. 16-18 (O'Connor, J., concurring in the judgment)).

Finally, Section 702 does not contravene the third part of the *Lemon* standard because it does not result in the entanglement of government and religion. Congress's decision to prevent any interference with the

religion-conscious hiring practices of religious organizations is the statutory approach least likely to create entanglement between religion and government. Elimination of the Section 702 exemption, on the other hand, would subject the employment decisions of religious organizations to continuing supervision by the Equal Employment Opportunity Commission through its broad statutory authority to investigate allegations of discrimination (see *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984)).

Thus, Section 702 satisfies all three parts of the *Lemon* test. The statute accordingly does not violate the Establishment Clause, and the district court erred by declaring Section 702 unconstitutional insofar as it applies to secular activities of religious organizations.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

MICHAEL CARVIN
Deputy Assistant Attorney General

ANDREW J. PINCUS
Assistant to the Solicitor General

IRVING GORNSTEIN
WILLIAM R. YEOMANS
Attorneys

SEPTEMBER 1986

APPENDIX

WM. BRADFORD REYNOLDS
MICHAEL CARVIN
BRIAN K. LANDSBERG
WILLIAM R. YEOMANS
Civil Rights Division
Department of Justice
Washington, D.C. 20530
Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

Civil No. C-83-0492W

CHRISTINE J. AMOS, JUDY BAWDEN, DENEICE KANON, APRIL JOYCE RIDING, ARTHUR FRANK MAYSON, RUTH ARRIOLA, SHELLEEN ADAMSON and RALPH L. WHITAKER on behalf of themselves and others similarly situated, PLAINTIFFS

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, and THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, DEFENDANTS

UNITED STATES OF AMERICA, INTERVENOR

[Filed June 13, 1986]

NOTICE OF APPEAL

Notice is hereby given that the United States, intervenor above-named, hereby appeals to the Supreme Court of the United States from the final order entered in this action on May 16, 1986.

This appeal is taken pursuant to 28 U.S.C. 1252.

WM. BRADFORD REYNOLDS
Assistant Attorney
General

MICHAEL CARVIN
Deputy Assistant
Attorney General

/s/ William R. Yeomans
BRIAN K. LANDSBERG
WILLIAM R. YEOMANS
Attorneys

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20316